COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NOS: 2015-SC-000178-D & 2015-SC-000181-D, CONSOLIDATED

KENTUCKY CATV ASSOCIATION, INC.; AND LORI HUDSON FLANERY (IN HER OFFICIAL CAPACITY AS SECRETARY OF THE FINANCE AND ADMINISTRATION CABINET); AND THOMAS B. MILLER (IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF REVENUE)

APPELLANTS

ON REVIEW FROM COURT OF APPEALS
NO. 2013-CA-001112
FRANKLIN CIRCUIT COURT NO. 11-CI-01418

vs.

CITY OF FLORENCE, KENTUCKY; CITY OF WINCHESTER, KENTUCKY; CITY OF GREENSBURG, KENTUCKY; CITY OF MAYFIELD, KENTUCKY; AND KENTUCKY LEAGUE OF CITIES, INC.

APPELLEES

BRIEF OF AMICUS CURIAE CHARTER COMMUNICATIONS, INC. IN SUPPORT OF APPELLANT KENTUCKY CATV ASSOCIATION, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Amicus Curiae Charter Communications, Inc. was served by U.S. mail, postage prepaid, this 26th day of April 2016, upon: Phillip Shepherd, Chief Circuit Judge, Div. I, Franklin Co. Courthouse, 222 St. Clair St., Frankfort, KY 40601; Sam Givens, Clerk for the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Bethany Atkins Rice, Office of Legal Services for Revenue, P.O. Box 423, Frankfort, Kentucky 40602-0423; Barbara B. Edelman, David J. Treacy, and Haley Trogdlen McCauley, Dinsmore & Shohl LLP, 250 W. Main Street, Suite 1400, Lexington, Kentucky 40507; Timothy J. Eifler, Douglas F. Brent, and Jackson W. White, Stoll Keenon Ogden PLLC, 2000 PNC Plaza, 500 W. Jefferson Street, Louisville, KY 40202; and Eric S. Tresh and Maria T. Todorova, Sutherland Asbill & Brennan LLP, 999 Peachtree Street, NE, Atlanta, GA 30309-3996.

John B. Nalbandian
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, OH 45202-3957
(513) 381-2838

Gardner F. Gillespie*
J. Aaron George*
Sheppard Mullin Richter & Hampton LLP
2099 Pennsylvania Ave., N.W., Suite 100
Washington, D.C. 20006-6801
(202) 747-2196
*pro hac vice applications pending

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION AND STATEMENT OF INTEREST

Charter Communications, Inc. ("Charter") submits this brief as *amicus curiae* in support of the Appellant's brief filed by the Kentucky CATV Association, Inc. ("KCTA") seeking reversal of the Kentucky Court of Appeals decision in *City of Florence v. Lori Hudson Flanery,* 2013-CA-001112.[1] The Court of Appeals erroneously invalidated Kentucky's Multichannel Video Programming and Communications Services Tax (the "Telecom Tax") by failing to accord it a presumption of constitutionality and by failing to consider and interpret the Kentucky Constitution as a whole. The Court of Appeals ignored the General Assembly's ***retained*** authority, as well as the Constitution's ***express*** grant of power to the General Assembly, to decide whether local governments may impose franchise fees on communications providers.

If this Court were to uphold the Court of Appeals and find the Telecom Tax invalid, its decision would have profound negative effects not only on communications providers, but also on competition for communications services, broadband deployment, and consumer choice in the Commonwealth. Prior to the Telecom Tax, some communications providers paid a constellation of state and local fees and taxes, including franchise fees on their gross revenue from cable service and property taxes on their intangible property. Their competitors, however—including direct broadcast satellite ("DBS") providers and AT&T—did not. The communications providers who paid the fees and taxes were forced either to build the extra taxes into the cost of services sold to Kentucky consumers or, in the case of local franchise fees, to pass them through to

[1] On March 28, 2016, the Court entered an Order consolidating KCTA's appeal of the Court of Appeals decision, Case No. 2015-SC-000178-D, with the appeal of the same decision by the Commonwealth's Finance and Administration Cabinet, Case No. 2015-SC-000181-D, to the extent that the two cases shall be heard together. Dkt. 17. *Amicus curiae* Charter files this brief in support of Appellant KCTA.

consumers directly under applicable law. The result was a market stacked against some communications providers in favor of their competitors based solely on discriminatory state and local fees and taxes, regardless of service offerings, technology, or quality of service. These disparities, in turn, stifled competition and denied Kentucky consumers a tax-neutral choice of service providers.

The General Assembly remedied this unfairness and promoted competition by enacting the Telecom Tax, effective on January 1, 2006, which replaced the prior hodge podge of state and local fees and taxes with a simple and fair system. The Telecom Tax treated all competing providers equally—including cable operators, telephone companies, and DBS providers. For more than a decade, the Telecom Tax has stimulated competition for communications services in Kentucky, expanded consumer choice, and improved the quality and reach of advanced communications services.

Invalidating the Telecom Tax would reverse this progress and return the Commonwealth to the fundamentally unfair system that the General Assembly abolished. That action also would spawn confusion and litigation, as it would leave many important questions unanswered: Is the invalidation retroactive? May communications providers obtain refunds of the Telecom Taxes they collected from their customers and paid to the state? Would local governments need to refund past Telecom Tax distributions to the State or to communications providers? May local governments pursue actions against communications providers for non-payment of the local franchise fees the Telecom Tax superseded, despite having accepted disbursements of Telecom Tax proceeds? These questions and others would spark disputes among communications providers, local

governments, and the Department of Revenue over payments, non-payments, and disbursements potentially reaching back nearly a decade.

Charter has a particular interest in this case because, while it does not currently provide communications services in the Commonwealth and is not a member of Appellant KCTA, it is in the process of seeking all necessary governmental consents to allow it to merge with Time Warner Cable, Inc. ("TWC"), which operates cable systems throughout the state. Charter already has obtained from the relevant Kentucky communities the consent to operate those cable systems after merging with TWC.[2] As a future competitor in the state's communications market, Charter has a strong interest in maintaining the fair and efficient taxation system established by the Telecom Tax.

Charter also has an interest in this case because it will inherit the confusion, uncertainty, and litigation that a decision to invalidate the Telecom Tax would spawn. These legacy disputes and the millions of dollars of potential exposure could derail Charter's plans to improve services and expand broadband in the Commonwealth.

Accordingly, Charter supports KCTA's request that the Court reverse the Court of Appeals decision and reinstate the decision of the Franklin Circuit Court finding the Telecom Tax constitutional.

ARGUMENT

I. Invalidating The Telecom Tax Would Harm Kentucky Citizens, The Commonwealth, And Communications Providers.

Invalidating the Telecom Tax would have serious and immediate consequences for the provision of communications services in Kentucky. The General Assembly

[2] On April 25, 2016, the Department of Justice approved Charter's proposed merger with TWC. On that same day, the Federal Communications Commission announced that it had circulated an order approving the merger subject to conditions. On May 12, 2016, the California Public Service Commission will vote on a proposed order granting the application with conditions.

enacted the Telecom Tax 10 years ago to "provid[e] a fair, efficient, and uniform method for taxing communications services sold in this Commonwealth," in part by eliminating "inequities and unfairness among providers and consumers of similar services." KRS 136.600(1)-(2). Prior to the Telecom Tax, competing communications providers faced differing tax and fee burdens depending on their medium of delivery. Cable operators, for example, paid local franchise fees, often amounting to 5 percent of their gross revenues derived from cable service, in addition to a state tax on their property. *See* 47 U.S.C. § 542(b) (franchise fees limited to 5 percent of gross revenues from cable service). Cable operators were entitled to, and did, pass through to their customers locally imposed franchise fees. *See id.* § 542(c) & (f). DBS providers and other competitors, however, paid neither state property taxes nor local franchise fees on their video services.[3] DBS providers and competitors like AT&T thus could provide similar services without incurring the 5-percent franchise fee surcharge or state property taxes. These taxes and fees created artificial imbalances that directly affected consumer choices. They also propagated a taxation scheme that was unfair and anticompetitive.

The Telecom Tax prohibited local franchise fees on communications companies and replaced the prior system of inconsistent state taxes with a uniform set of taxes and rules for passing these taxes through to customers on their bills. *See* KRS 136.604 & 136.616. The Telecom Tax imposed a 3 percent excise tax on all retail purchases of multichannel video programming services and a 2.4 percent tax on the gross revenues received by all providers of these services. *See* KRS 136.604(1)-(2) & 136.616(1)-(2). The combined 5.4 percent tax on multichannel video programming services

[3] AT&T maintained that its competitive video service was not a "cable" service and that it was not required to obtain local cable franchises or pay franchise fees on that service. *See, e.g., Mediacom Se. LLC v. BellSouth Telecomms., Inc.*, 672 F.3d 396 (6th Cir. 2012).

approximated the 5 percent franchise fees some communications providers previously paid to local governments—except now all competing video providers were required to pay it.

The Telecom Tax compensated local governments for their lost franchise fee revenue by returning to them a portion of the funds generated by the Tax every month. *Id.* 136.652(1)-(2). These monthly "hold harmless amounts" are derived from a formula reflecting the amount local governments historically collected from franchise fees. *Id.* 136.650(2)(c). Although local governments have received these payments for more than a decade, they now complain that the hold harmless amounts do not equal the amounts they had historically collected in franchise fees. But nothing in the Kentucky Constitution nor any other law guarantees local governments a right to 100 percent of the franchise fees they desire or formerly collected. To the contrary, federal law limits the maximum franchise fee that federal, state, and local government entities may charge to 5 percent of cable operators' gross revenues from cable service, while allowing a franchise fee in any amount less than 5 percent—including zero. *See* 47 U.S.C. § 542. And nothing in federal or state law limits the ability of the Commonwealth to decree that fees received by local governments should be less than the federal maximum. *See Liberty Cablevision of Puerto Rico v. Municipality of Caguas*, 417 F.3d 216 (1st Cir. 2005) (upholding an agreement allowing for a franchise fee payment of less than the federal maximum).

Thus, the local governments' real complaint is that they disagree with the General Assembly's legislative decision as to how to allocate the amounts collected under the Telecom Tax. That is not a constitutional issue that requires invalidation of the Telecom

Tax. As explained in Section II, the General Assembly acted within its inherent authority to regulate franchising and to delegate or withdraw local authority to impose fees on franchises. In so doing, the General Assembly remedied market imbalances and gave Kentucky consumers a tax-neutral choice of providers. The Telecom Tax allowed consumers to choose their communications service provider based on competitive market factors like the quality of service offered, rather than the amount of passed-through fees and taxes on their bills. The General Assembly understood that a fair competitive market ultimately promotes the public interest by increasing the number and quality of choices available to Kentucky consumers. *See, e.g.*, *Ky. Util. Co. v. Pub. Serv. Comm'n*, 390 S.W.2d 168, 174-75 (Ky. 1965) (upholding regulations favoring competition as beneficial to the public interest).

If the Telecom Tax were invalidated, however, Kentucky would revert to the prior system whereby local governments imposed discriminatory taxes and fees on wireline communications providers (like Charter), but not on DBS or "video" providers like AT&T competing for the same customers with the same or similar product. *See supra* note 3. These discriminatory taxes and fees would recreate the distorted market for video services that the General Assembly acted to eliminate more than a decade ago. Recreating these market distortions would deny consumers the benefits of robust competition and consumer choice. And it could discourage communications providers from expanding their reach within rural Kentucky and from rolling out new technologies and innovative service packages. Ultimately, the failure to make taxes and fees fair and equal among communications providers would hamper the deployment of broadband in the Commonwealth.

Nor would these ills be redressed by a decision that interpreted the Telecom Tax to allow local governments to opt out of the statewide tax, as suggested by the Department of Revenue. *See* Finance & Admin. Cabinet's Br. at 15, 26. That interpretation would eviscerate the purpose of the Tax (while purporting to defend it) by allowing local governments to perpetuate the unequal state and local tax and fee regimes the Telecom Tax was intended to remedy. In any case, the Telecom Tax expressly forecloses this interpretation. *See* KRS 136.660(1) ("[E]very political subdivision of this state shall be prohibited from . . . [l]evying any franchise fee or tax on multichannel video programming service . . . .").

Further, eliminating the Telecom Tax now would sow confusion, uncertainty, and years of additional litigation. Cable, telephone, and DBS providers have now paid the Telecom Tax for more than a decade. The Department of Revenue, in turn, has distributed millions to local governments in hold harmless payments. During that time, wireline video and communications providers have ceased paying local franchise fees in reliance on the Telecom Tax's mandates. But in invalidating the Tax the Court of Appeals shed no light on whether or how these various payments would be unwound, and those issues are not before this Court. As a result, if the Court were to eliminate Telecom Tax, whether in full or only to the extent it prohibits local governments from collecting franchise fees, local governments might attempt to recover upwards of 10 years' worth of unpaid local franchise fees from some communications providers, as well as assessments for prior period ad valorem taxes and possibly sales taxes on purchases of communications services, while DBS providers would face no potential going-back liability. Communications providers, in turn, would have to look to the Commonwealth

for refunds of their Telecom Tax payments, while the Commonwealth would seek refunds from local governments for distributions of hold harmless amounts. The chaos and disputes created ultimately would generate further inequities between competing providers, magnifying the problems the Telecom Tax was intended to remedy and harming communications providers and consumers.

II. The Court of Appeals Erred By Ignoring The General Assembly's Inherent Authority Over Franchises and Local Fees on Franchises And By Failing To Adopt A Harmonious Interpretation Of The Constitution's Franchising Provisions.

The Telecom Tax fits squarely within the Commonwealth's careful balancing of state and local authority and their interests related to franchises. That balance reserves to the General Assembly broad authority to regulate franchises (directly or by delegation), subject only to limited constitutional rights given to local governments. With the Telecom Tax, the General Assembly lawfully withdrew its prior delegation of authority to local governments to collect franchise fees. And it did so without disturbing the requirement in Section 163 that public utilities obtain initial franchises or the proscriptions in Section 164 related to municipal actions in granting of franchises.

The Court of Appeals decision spurned this constitutional framework by failing to acknowledge the General Assembly's inherent authority over franchising and local fees on franchises, and by erroneously removing these powers by implication. It also failed to consider the Constitution's franchising provisions as a whole. The decision instead considered Sections 163 and 164, which do not mention franchise fees, in isolation and out of context, inexplicably ignoring Section 181, which does mention such fees. As a result, the Court of Appeals committed reversible error by implying a constitutional right for municipalities to control franchise fees that is at war with the General Assembly's

inherent powers, and by failing to consider the Constitution's franchising provisions as a whole.

A. The General Assembly Retains Broad Authority Over Franchises, Including The Power To Delegate (Or Not) The Ability To Collect Franchise Fees.

The General Assembly may enact any laws that are not expressly or by necessary implication withheld from it by the Kentucky or U.S. Constitutions. *Legislative Research Com. v. Brown*, 664 S.W.2d 907, 914 (Ky. 1984) (quoting *Sibert v. Garrett*, 246 S.W. 455 (Ky. 1922)). This Court has long recognized the General Assembly's inherent authority over franchises. *Kentucky Utils. Co. v. Bd. of Comm'rs of Paris*, 71 S.W.2d 1024, 1027 (Ky. Ct. App. 1933) ("[T]he franchise inheres to the sovereignty of the state . . . ."); *See City of Florence v. Owen Elec. Co-op., Inc.*, 832 S.W.2d 876, 881 (Ky. 1992) (same); *Irvine Toll Bridge Co. v. Estill Cnty.*, 275 S. W. 634, 636 (Ky. Ct. App. 1925) ("[N]o one inherently possesses the right to grant a franchise, except the sovereignty within which it is proposed to be exercised . . . ."). "[S]ave to the extent it has been delegated by the Constitution or statutes to some local subdivision, [the franchise] is subject to the control of the Legislature." *Paris*, 71 S.W.2d at 1027. The Court's task here—as it was in *Paris*—"is to determine how far the people by their Constitution have stripped from their Legislature [the inherent] power [over franchises] and given it to . . . the municipalities." *Id.* The answer is that the Constitution does not prevent the General Assembly from limiting the amount of taxes and fees imposed by local governments on franchises. It certainly does not invalidate the Telecom Tax.

The Kentucky Constitution reserves to the General Assembly virtually all of the sovereign's inherent authority over franchises. And the General Assembly's exercise of that power enjoys a "strong presumption of constitutionality." *Holbrook v. Lexmark Int'l*

Grp., Inc., 65 S.W.3d 908, 914 (Ky. 2002). Municipalities, on the other hand, possess only those rights expressly granted to them by the Constitution or the General Assembly. *See, e.g.*, *City of Bowling Green v. T & E Elec. Contractors*, 602 S.W.2d 434, 435 (Ky. 1980); *Barrow v. Bradley*, 227 S.W. 1016, 1018 (Ky. 1921) (holding that the state legislature has the power to "confer and define local legislative power"). Courts must resolve any reasonable doubt against a municipality's power vis-à-vis the General Assembly against the municipality. *See City of Horse Cave v. Pierce*, 437 S.W.2d 185, 186 (Ky. Ct. App. 1969) (holding courts must resolve any doubts about the existence of a municipal power against its existence).

The Constitution delegates only limited franchising authority to municipalities in Sections 163 and 164. These sections do not "eliminate legislative authority regarding franchising." *City of Florence*, 832 S.W.2d at 881. Rather, Section 163 vests cities and towns with the limited right "to control the original occupation of [their] public ways and streets" by a public utility. *Paris*, 71 S.W.2d at 1027. No language in Section 163 takes away from the General Assembly its power to control local taxes or fees on franchises. Indeed, Section 163 nowhere mentions "fees" or "taxes."

Section 164 prescribes how municipalities may exercise their limited authority to grant franchises for the initial occupation of the rights of way. It specifies that they may not grant a franchise for a term longer than 20 years, and they must publicly bid the franchise and award it to the highest and best bidder. The framers included these limitations to prevent municipalities from giving away franchises without value. *See Berea College Utils. v. City of Berea*, 691 S.W.2d 235, 236 (Ky. Ct. App. 1985); *City of Princeton v. Princeton Elec. Light & Power Co.*, 179 S.W. 1074, 1076 (Ky. Ct. App.

1915) ("The sale to the highest and best bidder is to enable the municipality to receive the value of the privilege to be granted away, and to prevent municipal councils from granting valuable rights and privileges to favorites without any sufficient consideration."). While the Constitution requires municipalities to award the franchise to the highest and best bidder, it "put[s] no obstacle in the way of the Legislature" prescribing the "terms and . . . conditions" of the franchises to be awarded. *See Paris*, 71 S.W.2d at 1028 (upholding the constitutionality of a statute prescribing the terms and conditions for awarding franchises under Section 164); *Town of Hodgenville v. Gainesboro Tel. Co.*, 35 S.W.2d 888, 889 (Ky. Ct. App. 1931) (Section 164 does not prohibit the General Assembly from defining what constitutes the "highest and best" permissible bids). The General Assembly thus may establish parameters for determining the highest and best bidder, including by eliminating local taxes and fees from consideration. Indeed, there is no language in Section 164 taking away the General Assembly's power to control local franchise fees.

If these provisions were not sufficiently clear about preserving the General Assembly's inherent power over franchise fees, Section 181 leaves no room for reasonable debate. Section 181 expressly grants the General Assembly the authority, but not the obligation, to delegate to local governments the power "to impose and collect license fees . . . on franchises . . . ." KY. CONST. § 181; *see also George Weidemann Brewing Co. v. City of Newport*, 321 S.W.2d 404 (Ky. 1959). For more than a century, the General Assembly has delegated to municipalities and other political subdivisions of the state the authority to charge license fees on franchises. *See, e.g.*, KRS 91.200(1) & 92.280(2) (generally authorizing cities to impose license fees on franchises).

With the Telecom Tax, however, the General Assembly withdrew this delegated authority to impose fees on franchises granted to communications providers, as it was entitled to do pursuant to its inherent power and Section 181. *See* KRS 136.660(1) & (2) (prohibiting the imposition of "any tax, charge or fee" whether designated as a franchise fee or otherwise); *see also Jacober v. Bd. of Comm'rs*, 607 S.W.2d 126, 127 (Ky. App. 1980) ("[W]hat the legislature gives, it may take away."). Yet, by finding an ***implied*** constitutional right for municipalities to charge local franchise fees, the Court of Appeals by judicial fiat erroneously removed powers reserved exclusively to the General Assembly. The Court of Appeals decision committed reversible error by discounting the broad powers retained by the General Assembly, ignoring the express powers reserved to it, and failing to accord the Telecom Tax its due presumption of constitutionality.

B. The Court Of Appeals Failed To Consider The Constitution's Franchising Provisions Together.

The Court of Appeals was obligated to consider Sections 163, 164, and 181 together, and to interpret them harmoniously. *See Pinkston v. Watkins*, 216 S.W. 852, 854 (Ky. 1919). "[I]n construing constitutional provisions[,] different sections relating to [the] same subjects, but making different provisions concerning them, should be read together and construed so as to reconcile the provisions found in all the sections relating to the same common subject or subjects." *Id.* Considered together, Sections 163, 164, and 181 and this Court's precedent establish that the General Assembly retains its inherent authority to control franchise fees. They also establish that the General Assembly may delegate that authority to local governments, and may take away that authority once delegated.

Yet the Court of Appeals decision turned this constitutional framework and this Court's precedent on its head by interpreting Sections 163 and 164 in isolation, concluding that they ***imply*** that municipalities have sacrosanct rights to charge local franchise fees. Op. at 7; *see Asbury v. Robinson*, 409 S.W.2d 508, 510 (Ky. 1966) (finding reversible error where the court read constitutional provision in isolation without consideration of other relevant provisions). In so doing, the Court of Appeals inexplicably ignored the ***express*** authority Section 181 grants to the General Assembly to delegate to local governments, or not, its power to regulate franchise fees—despite the circuit court's reliance on Section 181 and all parties having briefed these issues. *See Standard Oil Co. v. Boone Cnty. Bd. of Supervisors*, 562 S.W.2d 83, 84 (Ky. 1978) (refusing to imply a right to a tax exemption where that right would violate the express language of the Kentucky Constitution); *Pinkston*, 216 S.W. at 854 (rejecting an implied reading of a constitutional provision where an express provision addressed the issue).

C. The Telecom Tax Does Not Infringe The Limited Rights Granted To Municipalities By Sections 163 and 164.

To overcome the Telecom Tax's presumption of constitutionality, the Court of Appeals was required to find a "clear, complete and unequivocal" violation of the Constitution. *Star v. Commonwealth*, 313 S.W.3d 30, 37 (Ky. 2010). But, as discussed above, the Telecom Tax does not contravene the plain meaning of the Kentucky Constitution. To the contrary, Section 181 of the Constitution directly supports the General Assembly's power to decide whether local governments may impose local franchise fees. Indeed, the Court of Appeals' reliance on supposed implied rights in Sections 163 and 164 demonstrates the absence of a "clear, complete and unequivocal" constitutional infirmity in the Telecom Tax.

Acknowledging that the Constitution does not expressly grant municipalities the right to collect a franchise fee, the Court of Appeals nonetheless found that right to be "indispensable" to their right to control the initial occupation of their rights of way. The Court of Appeals worried that the Telecom Tax would prevent cities from "receiv[ing] valuable consideration in exchange for the granting of the utility franchises." Op. at 6. But this fear is misplaced. It cannot displace the General Assembly's inherent powers to control and limit the authority of cities, including whether a city may impose a fee on a franchise. Indeed, in *Paris*, this Court specifically recognized the General Assembly's power to specify the terms and conditions of a franchise. *See Paris*, 71 S.W.2d at 1028 ("[T]he framers of our Constitution put no obstacle in the way of the Legislature requiring a city" to offer a new franchise for bid "on the terms and under the conditions the Legislature has set out in [the acts at issue].").

The Telecom Tax in no way threatens the ability of local governments to receive valuable consideration in exchange for the granting of a franchise. The Telecom Tax allows local governments to receive monetary distributions from the Telecommunications Tax fund, *see* KRS 136.650, 136.652, 136.654, 136.656, and 136.658, over and above the valuable non-franchise-fee benefits they may obtain in their franchise agreements. Subject to federal law, local governments can and do obtain valuable, non-franchise-fee benefits in franchise agreements with cable providers related to the geographic coverage of the system within the locality; the types of programming services provided; customer service obligations; channel capacity; the capital costs of facilities and equipment for public, educational, and government access ("PEG") television channels; provision of PEG channel capacity; indemnification or liability insurance coverage; and a host of

other service-related terms and conditions. *See, e.g.*, *Insight Commc'ns Co. v. Telecomm. Bd. of N. Ky.*, No. CIV. A. 05-142-DLB, 2006 WL 208828 at *1 (E.D. Ky. Jan. 25, 2006) (discussing a franchise provision requiring the rebuild and upgrade of a cable system).

These valuable terms, in addition to the Telecom Tax's "hold-harmless" payments, allow local governments to obtain ample value for the franchises they grant. Differences in these valuable terms, along with other considerations such as technological expertise, experience and financial capacity, allow cities to determine which is the highest and best bid. To be sure, this Court has long recognized that "the primary object a city would have, in contracting for or procuring the service of [a franchised utility], is not the revenue to be obtained for the city, but the securing of good and efficient service, and upon such terms as will, in the judgment of the city's governing body, promote the greatest good." *Louisville Home Tel. Co. v. City of Louisville*, 113 S.W. 855, 861 (Ky. 1908); *see also E.M. Bailey Distrib. Co. v. Conagra, Inc.*, 676 S.W.2d 770, 773 (Ky. 1984) ("The term 'best' can be interpreted to include that the bidder must be responsible and have the apparent ability to carry out the terms of the agreement for the benefit of the public"). The Telecom Tax preserves and reinforces the ability of local governments to secure revenue and "good and efficient service" in exchange for the franchises they grant. That local governments have complaints about the amount of revenue they receive does not mean that the General Assembly's legislative decision violates the Constitution.

RELIEF SOUGHT

For the reasons stated above and the reasons set out by Appellant KCTA, *amicus curiae* Charter respectfully requests that the Court reverse the Court of Appeals decision and hold the Telecom Tax constitutional.

Respectfully submitted,

John B. Nalbandian
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, OH 45202-3957
(513) 381-2838
nalbandian@taftlaw.com

Gardner F. Gillespie*
J. Aaron George*
Sheppard Mullin Richter & Hampton LLP
2099 Pennsylvania Ave., N.W., Suite 100
Washington, D.C. 20006-6801
(202) 747-1900
ggillespie@sheppardmullin.com
ageorge@sheppardmullin.com
*pro hac vice applications pending

Attorneys for Amicus Curiae Charter Communications Inc.